

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 10 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARVIN W. JOHNSON,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 16-72842

D.C. No. 3:92-cr-00497-EMC
Northern District of California,
San Francisco

ORDER

Before: REINHARDT, LEAVY, and NGUYEN, Circuit Judges.

The applicant seeks authorization to file a second or successive 28 U.S.C. § 2255 motion raising a claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and a claim that his due process rights were violated when he was sentenced for crimes for which he had neither been indicted nor charged. Insofar as the applicant seeks relief under *Johnson*, the application is denied as unnecessary and without prejudice. The record reflects that on December 16, 2016, the district court in case number 3:92-cr-00497-EMC granted the applicant's first section 2255 motion, which also raised a claim under *Johnson*. The district court has, however, stayed resentencing proceedings pending a decision by the Supreme Court in *Lynch v. Dimaya*, 15-1498.

With respect to the applicant's remaining claim, the application is denied because the applicant has not made a prima facie showing under 28 U.S.C.

§ 2255(h) of:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Any pending motions are denied as moot.

No further filings will be entertained in this case.